

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOSEPH SOTO,

Plaintiff,

CIVIL ACTION NO. 04-70966

v.

DISTRICT JUDGE ARTHUR J. TARNOW

NORMAN MINETA, Secretary,
Department of Treasury,

MAGISTRATE JUDGE DONALD A. SCHEER

Defendant.

_____/

ORDER GRANTING PLAINTIFF'S RULE 60 MOTION

This cause is before the magistrate judge on an Order of Reference for All Pretrial Proceedings. On May 14, 2004, defendant moved to dismiss certain counts of plaintiff's Complaint. Counsel for plaintiff failed to file a response to the motion. Following the expiration of the time allowed for a response under this court's Local Rules, the district judge granted the motion for the stated reason that plaintiff had failed to file a response thereto. On October 4, 2004, the district judge set a scheduling conference for October 18, 2004. Upon the failure of plaintiff and his counsel to appear for the conference, the court issued an Order to Show Cause Why the Case Should Not be Dismissed for Failure to Timely Prosecute. Plaintiff, with the assistance of new counsel, filed a response to the Order on January 19, 2005.

Following the referral of the case to the magistrate judge, a second status conference was set for March 30, 2005. Plaintiff and his new counsel did appear, and a Scheduling Order was issued. The Scheduling Order allowed plaintiff until April 15, 2005 to file a Motion for Reinstatement of the Dismissed Counts. Within the time allowed,

plaintiff filed a Motion for Relief from the Order of Dismissal, pursuant to Fed.R.Civ.P. 60(b)(1) and (6). Defendant filed his response to the motion on March 26, 2005.

It is the general rule that the errors and omissions of counsel are attributable to the party represented, and will not warrant Rule 60 relief. The Rule, however, is not without exception. In the case at bar, plaintiff's original counsel appears to have taken no action on his behalf subsequent to the filing of his Complaint. The representations of his current counsel, in plaintiff's Rule 60 motion and brief, as well as in Plaintiff's Motion for Substitution of Counsel, suggest a total abandonment of plaintiff's case by his prior counsel, and a complete refusal/inability on the part of that attorney to respond to repeated attempts by plaintiff and his new lawyers to communicate with her in an effort to prosecute this case. I am satisfied that the level of neglect is such as to warrant the conclusion that plaintiff's now dismissed attorney either suffers from a disability or was wilfully neglectful of his interests. I find such circumstances to be a sufficient reason justifying relief from the operation of the August 4, 2004 Dismissal Order, pursuant to Fed.R.Civ.P. 60(b)(6).

In addition to the abandonment of plaintiff by his attorney, I base my determination upon a finding that defendant will not be prejudiced by reinstatement of the dismissed counts. Defendant's Motion to Dismiss may be renewed, and evaluated in detail on the merits, with the assistance of written and/or oral argument by counsel for both sides.

IT IS THEREFORE ORDERED that Plaintiff's Rule 60 Motion For Relief from this Court's August 4, 2004 Order Granting Defendant's Motion for a Partial Dismissal of the Complaint is granted. Counts 1, 2, 3, 6, 13 and 14 of plaintiff's Complaint are reinstated.

IT IS FURTHER ORDERED that the discovery cut-off and dispositive motion deadline dates contained in the court's Scheduling Order of March 31, 2005 are amended. The discovery cut-off shall be September 15, 2005, and dispositive motions shall be filed no later than October 17, 2005.

s/Donald A. Scheer
DONALD A. SCHEER
UNITED STATES MAGISTRATE JUDGE

DATED: July 14, 2005

CERTIFICATE OF SERVICE

I hereby certify on July 14, 2005 that I electronically filed the foregoing paper with the Clerk of the Court sending notification of such filing to all counsel registered electronically. I hereby certify that a copy of this paper was mailed to the following non-registered ECF participants on July 14, 2005. **None.**

s/Michael E. Lang
Deputy Clerk to
Magistrate Judge Donald A. Scheer
(313) 234-5217